

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

SNO-KING ENVIRONMENTAL)	
ALLIANCE, EMMA DIXON and)	Case No. 06-3-0005
GERALD FARRIS,)	
)	(Sno-King)
)	
Petitioner,)	
)	
v.)	
)	
SNOHOMISH COUNTY,)	FINAL DECISION and ORDER¹
)	
Respondent)	
)	
KING COUNTY,)	
)	
Intervenor.)	
)	

SYNOPSIS

In October 2005, Snohomish County adopted three ordinances: Ordinance 05-121 relating to Odor Order Prevention Standards for certain facilities; Ordinance 05-122 relating to Construction Standards in Seismic Hazard Areas; and Ordinance 05-126 revising the procedures for siting for Essential Public Facilities. Each of these Ordinances was enacted by the County as an Emergency Ordinance. Ordinances 05-121 and 05-122 were adopted pursuant to RCW 36.70A.390 and Ordinance 05-126 was adopted pursuant to SCC 30.73.090. Petitioners challenged these enactments as not consistent with the Growth Management Act (GMA), RCW 36.70A, on the basis of notice, public participation, best available science, and consistency.

The Board found that the County's actions in adopting these Ordinances did not violate the applicable public participation provisions of the GMA [Legal Issue No. 1]. The Board concluded that the Petitioners failed to carry their burden of proof on their challenge to Ordinance 05-122 pertaining to best available science as it relates to seismic hazard areas [Legal Issue No. 2]. The Board determined that the Petitioners could not raise the issue of consistency with Comprehensive Plan provisions because they

¹ Although this FDO mentions the Brightwater Wastewater Treatment Facility as context for the challenged actions; this FDO is not to be interpreted as a Board opinion related to that project.

did not provide evidence to support GMA participation standing on that issue [Legal Issue No. 3]. The Board entered an order dismissing the petition.

I. BACKGROUND

The genesis of this appeal is a dispute regarding Snohomish County's regulations pertaining to wastewater treatment facilities – essential public facilities. The catalyst for the action was, and is, the Brightwater Wastewater Treatment Facility, proposed by King County but sited in Snohomish County. The siting and regulation of this essential public facility has spawned five prior and separate appeals to this Board.²

The last appeal (*King County IV*) involved Snohomish County's adoption of new Odor and Seismic Hazard regulations (Emergency Ordinance Nos. 05-029 and 05-030, respectively). However that matter was dismissed when King and Snohomish Counties resolved their dispute and executed a settlement agreement. The settlement agreement, in turn, led to a stipulation for dismissal from the parties, which the Board granted.³ Petitioners here, Sno-King Environmental Alliance, were interveners on behalf of Snohomish County in the *King County IV* matter.

The precipitating action in the present appeal is Snohomish County's adoption, or ***re-adoption***,⁴ of the Odor and Seismic Ordinances (Emergency Ordinance Nos. 05-121 and 05-122 respectively); as well as the adoption of an Ordinance amending Snohomish County's essential public facility regulations (Emergency Ordinance No. 05-126 – the **EPF Ordinance**) and an Ordinance authorizing the County to execute a site specific

² 1) *King County v. City of Edmonds [Unocal – Intervenor] (King Co.)*, CPSGMHB Case No. 02-3-0011, Order of Dismissal, (Sep. 12, 2002); 2) *King County v. Snohomish County [Cities of Renton and Intervenor; Puget Sound Water Quality Defense Fund – Amicus] (King County I)*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003), and Order Finding Continuing Noncompliance and Continuing Invalidity and Notice of Second Compliance Hearing, (May 26, 2004), and Order on Court Remand of CPSGMHB Case No. 03-3-0011, (Jul. 29, 2005), and Order Finding Compliance, (Mar. 27, 2006); 3) *King County and City of Renton v. Snohomish County (King County II)*, CPSGMHB Case No. 03-3-0025, Order of Dismissal, (May 26, 2004) – See *King County I*, and Order Revising Order of Dismissal, (Feb. 1, 2005); 4) *King County v. Snohomish County (King County III)*, CPSGMHB Case No. 04-3-0012, Order of Dismissal, (May 26, 2004) – See *King County I*; 5) *King County and City of Renton v. Snohomish County [Sno-King Environmental Alliance – Intervenor] (King County IV)*, CPSGMHB Case No. 05-3-0033, Order of Dismissal, (Jan. 23, 2006).

³ The settlement agreement also laid the groundwork for revisions to Snohomish County's essential public facility regulations and ultimately led to the Board's entering a Finding of Compliance in the *King County I* matter.

⁴ The initial Odor and Seismic Emergency Ordinances (05-029 and 05-030) that were challenged in *King County IV* were slated to expire on October 18, 2005. On October 17, 2005, Snohomish County, essentially readopted the same provisions for an additional six month period. The Board further notes that the present Ordinances [05-121 and 05-122] have also "expired" and been "re-adopted" again by the County in the form of Ordinance Nos. 06-024 and 06-025. On June 19, 2006, Sno-King Environmental Alliance and Corinne Hensley filed a new PFR challenging these Ordinances – See *Sno-King II v. Snohomish County*, CPSGMHB Case No. 06-3-0025.

development agreement regarding the Brightwater facility with King County (Ordinance No. 05-127 – the **DA Ordinance**).

On February 6, 2006, the Board received a timely petition for review from Sno-King Environmental Alliance, Emma Dixon and Gerald Farris. The Board entered a Notice of Hearing setting a prehearing conference in March. Following the prehearing conference, Petitioners clarified their Legal Issues. The Board subsequently issued the Prehearing Order setting the final schedule and Legal Issues to be decided. Also in March, King County was granted status as an Intervenor.

During April and May the Index of the Record was amended by the County and the addition of several supplemental exhibits proposed by Petitioners was authorized by the Board. Also during the Board's motions practice, the County moved to dismiss various issues and challenges to certain ordinances. The Board **granted** in part and **denied** in part Snohomish County's motions. The Board's May 25, 2006 Order on Motions established the record and the remaining Legal Issues to be decided. Petitioners' challenge to Ordinance No. 05-127 (the DA Ordinance) was **dismissed** for lack of subject matter jurisdiction. The other three Emergency Ordinances – 05-121, 05-122 and 05-126, are still before the Board.

In June, the Board timely received the prehearing briefs of the parties. The Briefing received will be hereafter referenced as follows:

- Petitioners Sno-King Environmental Alliance, Emma Dixon and Gerald Farris's Prehearing Brief - **Sno-King PHB**;
- Respondent Snohomish County's Prehearing Response Brief – **Snohomish Response**;
- Respondent Snohomish County also filed a Motion to Supplement the Record – **Snohomish Motion – Supp.**;
- Intervenor King County's Prehearing Response Brief – **King Response**;
- Petitioners Prehearing Reply Brief – **Sno-King Reply**.

On July 6, 2006, the Board held the Hearing on the Merits (HOM) at the Board's offices at Suite 2470, 900 Fourth Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Margaret A. Pageler and Bruce C. Laing⁵ were present for the Board. Corinne Hensley appeared for Petitioners Sno-King Environmental Alliance, and Emma Dixon appeared *pro se*. Petitioner Gerald Farris did not appear. Respondent Snohomish County was represented by John R. Moffat, Lisa Anderson and Shawn Aronow. Intervenor King County was represented by Verna P. Bromley. Court reporting services were provided by Eva Jankowitz of Byers and Anderson. Board Law Clerk, Julie Taylor and Board Externs Brian Payne and Kris Hollingshead were also present. The hearing convened at 10:00 a.m. and adjourned at approximately 12:15 p.m.

⁵ Board member Bruce C. Laing's term was slated to expire on June 30, 2006. However, Governor Gregoire extended Mr. Laing's term until a new Board member can be seated.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF and STANDARD OF REVIEW

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1).

Petitioners challenge Snohomish County's adoption of amendments to their development regulations pertaining to essential public facilities, as adopted by Emergency Ordinance Nos. 05-121 (**Odor**), 05-122 (**Seismic**) and 05-126 (**EPF**). Pursuant to RCW 36.70A.320(1), Snohomish County's Emergency Ordinance Nos. 05-121, 05-122 and 05-126 are presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the actions taken by Snohomish County are not in compliance with the goals and requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the actions taken by [Snohomish County] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find Snohomish County's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Snohomish County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The State Supreme Court's most recent delineation of this required deference states: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

The *Quadrant* decision is in accord with prior rulings that "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). As the Court of Appeals explained, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent' with the requirements

and goals of the GMA.” *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005).

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION, PREFATORY NOTE and PRELIMINARY MATTERS

A. BOARD JURISDICTION

The Board finds that the PFR filed by Sno-King Environmental Alliance was timely, pursuant to RCW 36.70A.290(2); these Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the remaining challenged ordinances, which amend the County’s development regulations, pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

The Actions Challenged:

Petitioners challenge three separate emergency ordinances adopted by Snohomish County apparently in response to the Settlement Agreement with King County to resolve litigation regarding the “Brightwater” wastewater treatment facility. The challenged Emergency Ordinances are: 05-121 [Odor Ordinance]; 05-122 [Seismic Ordinance]; and 05-126 [Essential Public Facility or EPF Process Ordinance]. Each amends portions of the Snohomish County Code (SCC).

Emergency Ordinance No. 05-121 – Odor: Petitioners challenge the County’s Public Participation process and Consistency with GMA Plan provisions – Legal Issues 1 and 3.

This Ordinance adopts a new section in the Snohomish County Code – 30.28.092 – pertaining to Odor Prevention standards for certain facilities. It applies to applications for new wastewater treatment facilities, portals, pump stations, and outfalls that have the potential to generate odor emissions, *or any other use*, except agricultural uses, that have potential to generate emissions of hydrogen sulfide or ammonia. SCC 30.28.092(1). Odor emission standards are set for hydrogen sulfide at no more than .08 parts per billion (ppb) and no more than 2800 ppb for ammonia as detected at the property boundary, *or beyond*. SCC 30.28.092(2). The Ordinance also provides for design and operational standards, provisions for transporting materials that may omit odor, and a requirement for development of an odor monitoring and response plan.

Emergency Ordinance No. 05-122 – Seismic: Petitioners challenge whether the County used best available science and otherwise complied with the GMA’s critical areas provisions for geologically hazardous areas – Legal Issue 2.

This Ordinance changes the definition of Seismic Hazard Areas, deleting “mapped seismic zones 3 and 4 in the Uniform Building Code” and adding “areas that have been determined by the building official to have known or inferred faults or ground rupture potential, liquefaction potential, or seismically induced slope instability.” SCC 30.91S.120. [Licensed professionals must provide relevant geological reports to make this determination.]

The Ordinance also establishes a 50’ setback from the closest edge of an identified active fault trace. SCC 30.51.010(1). The setback applies to seismic use groups II and III and seismic design categories E and F as defined in the International Building Code, adopted by Chapter 19.27 RCW [State Uniform Building Code]. *Id.* Additionally, the building official may require additional studies, tests or site investigations to determine the specific location of an active fault trace. SCC 30.51.020.

Emergency Ordinance No. 05-126 – EPF: Petitioners challenge the County’s public participation process and consistency with GMA Plan provisions – Legal Issues 1 and 3.

This Ordinance authorizes the County Council to approve development agreements for the siting of essential public facilities. SCC 30.75.020(1). Decision criteria are set forth, but may be exempted or modified if they would preclude the siting, development or expansion of an essential public facility. SCC 30.75.100 and .130.

C. PRELIMINARY MATTERS

Oral Rulings at the HOM:

The Board entertained brief argument from the parties regarding Snohomish County’s Motion to Supplement the Record. The Presiding Officer orally **granted** the County’s Motion. The “August 3, 2004 King County Hearing Examiner’s Decision Denying Appeal, Subject to Condition for the Brightwater Final Environmental Impact Statement Appeals of Adequacy” is **admitted** to the Record as Hearing on the Merits Exhibit 1 – **HOM Ex. 1**.

Additionally, the Board took **official notice** of Emergency Ordinance No. 06-024 [re-adopting the challenged Odor Ordinance] and Emergency Ordinance No. 06-025 [re-adopting the challenged Seismic Ordinance]. The Board determined that the substantive provisions of Ordinance No. 05-121 and Ordinance No. 06-024 were identical; and that the substantive provisions of Ordinance No. 05-122 and Ordinance No. 06-025 were identical. The two challenged Ordinances were slated to expire on April 17, 2006 but were extended through the adoption of the two new Ordinances – Emergency Ordinance Nos. 06-024 and 06-025.

The Board **denied** Petitioners motion to strike all references to the Brightwater wastewater treatment facility from the County's brief and exhibits. The primary reason for allowing reference to Brightwater was due to the discovery of a potential active fault that occurred during in the review of this project.

The Board entertained argument on Snohomish County's Motion to Dismiss Legal Issue 3 for lack of standing of Petitioner and in the alternative, to limit the consistency challenge to Plan provisions in place at the time of the adoption of the challenged ordinances. The Board took these issues **under advisement** and indicated it would rule on these questions in this FDO. *See* Legal Issue 3, *infra*.

IV. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE NO. 1 – PUBLIC PARTICIPATION

Legal Issue No. 1, as stated in the PFR and PHO, was modified by the Board's 5/25/06 Order on Motions. Legal Issue No. 1 is now stated as follows:

- 1. The Ordinances 05-121, 05-122, 05-126 all thwart GMA's public participation process. The County has violated planning goal RCW 36.70A.020(11) by not providing adequate citizen participation in their planning process and not ensuring that all jurisdictions and communities were adequately involved in this planning process. The County has provided over the years public participation for its development regulations and comprehensive plan as required by RCW 36.70A.140. However, in the case of these three ordinances, the County's process was null and void or avoided completely as Petitioners will show, thus violating RCW 36.70A.140. See PFR, at 2-3; PHO, at 7; and Order on Motions (OoM), Appendix A, at 17, and Appendix B, at 19.*

*[The Board characterizes **Issue One** as: Did Snohomish County (the **County**) fail to comply with the public participation provisions of RCW 36.70A.020(11) and .140, when it adopted Ordinance Nos. 05-121 (Odor), 05-122 (Seismic), and 05-126 (Essential Public Facility Procedures -EPF)?]*

Applicable Law

Goal 11 requires the County to "Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts." RCW 36.70A.020(11).

RCW 36.70A.140 requires the County to establish and disseminate a public participation program that identifies procedures for "early and continuous public participation in the development and amendment of [plans and] development regulations implementing such plans." Additionally, .140 requires "broad dissemination of proposals and alternatives,

opportunity for written comments, public meetings after effective notice, provisions for open discussion, communication programs, information services, and consideration of and response to public comments.”

Discussion

It is important to note that the Board has **dismissed** Petitioners’ challenge to the adequacy of the County’s notice provisions regarding the three challenged ordinances. The Board concluded that,

The evidence provided by the County clearly demonstrates that the published notice for all ordinances and mailed notice for [the Odor and Seismic Ordinances] were “reasonably calculated to provide notice to property owners and other affected and interested individuals . . . and organizations of proposed amendments to . . . development regulations.” (Citations omitted). Therefore, the County’s motion related to the notice challenge [compliance with RCW 36.70A.035] in Legal Issue 1 is **granted**. Reference to RCW 36.70A.035 will be **stricken** from the Issue.

Sno-King, et al., v. Snohomish County, CPSGMHB Case No. 06-3-0005, Order on Motions, (May 25, 2006), at 14.

Therefore, what remains of this issue is just the public participation challenge as it relates to Emergency Ordinance Nos. 05-121, 05-122 and 05-126.

Position of the Parties:

Petitioners acknowledge that the County has adopted a public participation program that outlines procedures for public participation in adopting and amending its Plan and implementing regulations [*i.e.* 30.74.010 SCC]. However, Petitioners contend that the County did not follow those procedures in acting on the three challenged ordinances. *Sno-King PHB*, at 4-8. Instead, Petitioners complain that the County erroneously adopted these measures via “Emergency Ordinances” which circumvent the County’s public participation procedures. *Id.* at 8-11. Further, Petitioners assert that no emergency existed, or is justified, to support these ordinances and that the County seems to be undergoing an “ongoing emergency” related to these ordinances. *Id.* at 11-13. Finally, Petitioners contend that the “ongoing emergency” in Snohomish County creates conflict with the public, and although there has been ample time to allow for public participation, including review by the Planning Commission, the County has not provided it. *Id.* Petitioners suggest that the County should have followed the review and amendment procedures set forth in RCW 36.70A.130 [annual review cycle] or .470 [docketing procedures.] *Id.*

The County responds that, as Petitioners acknowledge, it has adopted and implements a public participation program as required by RCW 36.70A.140 – citing Chapter 30.73

SCC. However, the County argues these provisions of the SCC [nor the .140 provisions of the GMA] do not apply to the challenged Ordinances since they were adopted via emergency procedures. Snohomish Response, at 1-8. The County notes that Emergency Ordinance Nos. 05-121 [Odor] and 05-122 [Seismic] were adopted pursuant to RCW 36.70A.390,⁶ and were adopted for an interim period of six-months. The County also notes that Emergency Ordinance No. 05-126 was adopted pursuant to emergency provisions in the Snohomish County Code – 30.73.090(3) and 30.73.040(2)(a) - which allows such action without planning commission review so long as there is a public hearing prior to adoption. In either case, the County asserts it was not required to adopt the Ordinances pursuant to .140. *Id.* at 9. The County further documents, and Petitioners do not dispute, that for each Ordinance there was a public hearing that provided the opportunity for public comment, both orally and in writing.⁷

Additionally, the County argues that this Board has held that RCW 36.70A.140 does not apply to emergency actions – *citing McVittie v. Snohomish County (McVittie V)*, CPSGMHB Case No. 00-3-0016, Final Decision and Order, (Apr. 12, 2001), at 20-24. Snohomish Response, at 8. Further, the County argues that the question of whether an emergency existed, or circumstances justified the County’s action, was not alleged as a Legal Issue in Petitioners’ PFR or in the PHO. Therefore, the County asserts, the Board may not address this issue. *Id.* at 10. The County also contends that the annual review provisions of RCW 36.70A.130(2) are not alleged in this matter, nor do they apply to development regulations. Likewise the docketing provisions of RCW 36.70A.470 are not alleged in this case, nor are they applicable to these emergency actions. *Id.*

Intervenor King County contends that the County’s declaration of emergency⁸ is presumed valid and that the Board has previously determined that it will not review such declarations – *citing Wallock v. City of Everett (Wallock I)*, CPSGMHB Case No. 96-3-0025, Final Decision and Order, (Dec. 3, 1996), at 10 and *Clark v. City of Covington (Clark)*, CPSGMHB Case No. 02-3-0005, Final Decision and Order, (Sep. 27, 2002), at 5. Intervenor also supports the assertion of the County that the Odor and Seismic Emergency Ordinances were adopted pursuant to the provisions of .390. *Id.*

Petitioners reply that the County’s continued reliance upon emergency actions undermines public participation as anticipated by the GMA. Sno-King Reply, at 4. Petitioners note that the original emergency ordinances – 05-029 [Odor] and 05-030

⁶ RCW 36.70A.390 allows adoption of interim measures without planning commission or agency recommendation or without holding a public hearing so long as a public hearing is held within 60-days of its adoption and findings are entered. *See* RCW 36.70A.390. These Ordinances were adopted on October 17, 2005 and the public hearing was on December 7, 2005.

⁷ *See* Emergency Ordinance No. 05-121, at 3, and Emergency Ordinance No. 06-024, at 1 [Odor Ordinances]; Emergency Ordinance No. 05-122, at 3, and Emergency Ordinance No. 06-025, at 1 [Seismic Ordinances]; and Emergency Ordinance No. 05-126, at 3. *See also*, 5/25/06 Order on Motions, at 14.

⁸ Intervenor quotes the WHEREAS provisions of both Emergency Ordinances as evidence of the facts and circumstances – the findings – supporting the declaration of emergency. *See* King Response, at 2-4, and the WHEREAS clauses of Ordinance Nos. 05-121 and 05-122.

[Seismic] have expired and have been replaced by the challenged emergency ordinances – 05-121 and 05-122; and now even these actions have been replaced by new Emergency Ordinance Nos. 06-024 [Odor] and 06-025 [Seismic]. *Id.* Petitioners claim that in lieu of an early and continuous public participation process with Planning Commission participation and SEPA review, the County’s “emergency” is ongoing and contrary to the GMA. *Id.*

Board Discussion:

Although the Board understands the depth of Petitioners concerns, the Board must agree with the County and Intervenor. It is undisputed that the public, including Petitioners, were provided the opportunity to comment on the challenged Emergency Ordinances at a public hearing on December 7, 2005, a hearing held within the 60-day timeframe required by RCW 36.70A.390. Petitioners provided testimony and written comment on the Emergency Ordinances, but were unable to persuade the County to accept their views. While review by the Planning Commission and expanded public participation is encouraged by the GMA, the County is correct that the GMA does not compel such procedures when an emergency is declared or interim measures are enacted. RCW 36.70A.390 provides one means of taking such action and the County Code provides another. However, under either option, effective notice and the opportunity for public participation are provided. Snohomish County has adhered to these provisions and has **complied** with the applicable notice and public participation requirements and goal of the GMA.

The Board also affirms its prior decisions in *McVittie V*, *Wallock I* and *Clark*. In *McVittie V* the Board held that RCW 36.70A.140 is not applicable to emergency or interim actions so long as effective notice and the opportunity for public comment is provided. In *Wallock I* and *Clark* the Board indicated it will not inquire into the facts and circumstances supporting a jurisdiction’s declaration of emergency.

The Board acknowledges the Petitioners’ frustration with the County’s continued use of emergency actions to address the Odor and Seismic issues posed in this PFR, but the GMA does not specifically constrain the exercise of such discretionary actions by local jurisdictions.⁹ Emergency actions, by their very nature, may bypass the more extensive public review procedures of .140, the annual review provisions of .130 and the docketing procedures of .470. Nonetheless, the Board is encouraged that the County indicated at the HOM that it is moving to adopt *permanent* Odor and Seismic regulations and is availing itself of the expertise of its Planning Commission in a broader discussion with the public of these regulations.

⁹ Note however, that in *MBA/Camwest v. City of Sammamish*, CPSGMHB Case No. 05-3-0027, Final Decision and Order, (Aug. 4, 2005) the Board found that an emergency moratorium re-enacted 12 times (6-years) was a *de facto* permanent development regulation and no longer an interim ordinance or measure subject to .390.

Conclusion

Snohomish County provided effective notice and the opportunity for public comment when it adopted Emergency Ordinance Nos. 05-121 and 05-122 [pursuant to .390] and Emergency Ordinance No. 05-126 [pursuant to SCC 30.73.090]. The County has **complied** with the applicable public participation procedures and Goal 11 of the GMA in adopting the challenged Emergency Ordinances.

B. LEGAL ISSUE NO. 2 – CRITICAL AREAS AND BEST AVAILABLE SCIENCE

Legal Issue No. 2, as stated in the PFR and PHO, was modified by the Board's 5/25/06 Order on Motions. Legal Issue No. 2 is now stated as follows:

2. (A) *The County has violated State Law, Best Available Science (BAS) RCW 36.70A.172 and RCW 36.70A.060(2), RCW 36.70A.170. The ordinance [05-122] does not protect the function and values as well as the public where necessary to protect critical areas and areas of human habitation. See PFR, at 3; PHO, at 7-8; and OoM, Appendix A, at 17-18, and Appendix B, at 19.*

*[The Board characterizes **Issue Two A** as: Did the County fail to comply with the critical area provisions of RCW 36.70A.060(2), .170 and .172 when it adopted the Seismic-Ordinance?]*

Applicable Law

RCW 36.70A.170 requires the County to identify and designate critical areas – including Geologically Hazardous Areas. “Geologically Hazardous Areas” are defined as “areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential or industrial development consistent with public health and safety concerns.” RCW 36.70A.030(9).

RCW 36.70A.060(2) requires the County to “adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.”

RCW 36.70A.172(1) provides, in relevant part:

In designating and protecting critical areas under this chapter, counties and cities *shall include the best available science* in developing policies and development regulations *to protect the functions and values of critical areas.*

(Emphasis supplied).

Discussion

Geological Context:

The movement of the earth's tectonic plates is a source of seismic activity. The Puget Sound region is an active seismic area, and part of the larger area known as the Cascadia subduction zone. In the northwest, the Juan de Fuca plate's movement under the North American plate is a significant source of the region's volcanoes and earthquake activity. Ex. B-39. The Seattle Fault and the South Whidbey Island Fault (**SWIF**) are evidence of this seismic activity. Here there is no dispute that the SWIF is now understood to extend through portions of Snohomish County and into portions of King County. *See* Ex. B-30, Brightwater Draft Supplemental EIS, at 2-1. Recent studies by the U.S. Geological Service (**USGS**) have also discovered new faults, or lineaments [Lineaments 4, and perhaps X], to the SWIF extending into southern Snohomish County in proximity to the proposed Brightwater Wastewater Treatment Facility site. *Id.*

Regulatory Context – the International Building Code (**IBC**):

The IBC, which is adopted by the State of Washington as RCW 19.27, governs construction of buildings and structures in all local jurisdictions. The IBC includes provisions for design and construction in seismic hazard areas where documented active faults exist. Ex. B-25. Mapping of these active faults by the U.S. Geologic Services (**USGS**) is required in order to have the IBC's provisions apply. *Id.* The IBC provides a classification system (Category I, II, III and IV) for buildings and other structures by the nature of occupancy and for different risk factors, including seismic risk. Category I structures are generally those that pose a lower hazard to human life if the structure fails than might occur to structures listed in the other Categories. Category II structures include structures not listed in Categories I, III and IV, which would include most residential, commercial and industrial development. Category III facilities generally include public facilities (*e.g.* power generating stations, water and wastewater treatment plants) and buildings and structures where large numbers of people congregate (*e.g.* 250 students, 300 people, 50 patients). Category IV structures includes essential facilities (*e.g.* hospitals, fire, police, rescue, emergency facilities and shelters). *Id.* Seismic Design Categories range from Category A to F, which relate structure risk and seismic risk. Category A pertains to low risk structures in areas of low seismicity. Structures in Category E and F “shall not be sited where there is a known potential for an active fault to cause rupture of the ground surface at the structure.” Ex. B-24, at 131.

Position of the Parties:

Generally, Petitioners suggest that the County's Seismic Ordinance only applies to a single project [*i.e.* Brightwater] and not to other types of facilities within seismic areas. Sno-King PHB, at 18. Additionally, Petitioners assert that the County's adoption of setbacks is unsubstantiated under law, and that best available science (**BAS**) must be used to determine the correct actions to take. *Id.*

Specifically related to the Seismic Ordinance, Petitioners contend that the: 1) County's definition of "Seismic Hazard Areas" differs from the GMA's definition of "Geologically Hazardous Areas" because it does not include a "suitability requirement" [apparently, to identify areas that are "not suitable" for development]; 2) County *itself* has not undertaken the responsibility for identifying and locating potential faults and other seismic area, but instead relies upon information provided by others; 3) application of the Ordinance should apply to other uses and facilities such as multi-family housing, schools and churches, where large numbers of people congregate; 4) the building official that enforces the Ordinance is not qualified, since only a state licensed geologist can practice geology; 5) setbacks are not supported by science, since the International Building Code does not contain setback requirements; and 6) it is questionable that Seismic Group III uses and Seismic Design Category E or F structures would survive a surface rupture with only a 50' setback. *Id.* at 19-27.

In response, the County notes that it is presently in the process of conducting its critical areas regulation review and update as required by the GMA and has produced a document summarizing BAS for that process which was relied upon here. Snohomish Response, at 13; *see* Ex. B-39. The County contends that the development and adoption of its Seismic Ordinance was precipitated by investigations on the Brightwater site, which led to the identification of a "regulatory gap" where the IBC would not apply. The County asserts that it filled that "gap" by adopting the challenged Ordinance. *Id.* In short, the County explains that further geologic investigation of the Brightwater site was required that disclosed an extension of the SWIF – Lineaments 4 and X. These areas have not yet been mapped by the USGS and incorporated into the IBC. Consequently, they are not covered by the IBC, state building code or the present county building code. Therefore, the County adopted the challenged Seismic Ordinance to fill the present void. Snohomish Response, at 14-18.

Specifically, related to the Seismic Ordinance, the County argues that: 1) BAS (*i.e.* USGS mapping and the use of aeromagnetic surveys, ground magnetic surveys, light detection and ranging imagery data [LiDAR] and trenching) has been, and is used to identify and designate seismic hazard areas such as the recently discovered faults germane to the pending matter, but BAS need not be relied upon to protect the "functions and values" of geologically hazardous areas since they do not require protection – rather, these areas need to be identified to protect people and property from the effects of seismic events; 2) GMA definitions by themselves do not create substantive duties, *citing Hanson v. King County*, CPSGMHB Case No. 98-3-0015c, Final Decision and Order, (Dec. 16, 1998), at 7-8; 3) the County's definition, which includes inferred faults, affords additional protection to the public and is not contrary to the GMA's definition; 4) the Seismic Ordinance applies to *all* structures included in Seismic Use Group II and III and Seismic Design Categories E and F and Petitioners have failed to point to any GMA provision that requires the County to include all the structures desired by them; 5) the Ordinance's requirement that any structure be setback 50-feet from an identified active trace fault and the authorization to require additional studies are supported by comparable

seismic regulations in other jurisdictions (*e.g.* State of California, Los Angeles County, Cities of Los Angeles and San Diego, and Salt Lake County, Utah) and is within the County's discretion. Snohomish Response, at 18-30.

Intervenor King County contends that more is being learned about earthquake faults and that the authorization for the building official to require additional studies and investigations incorporates and goes beyond BAS. King Response, at 7. Also, Intervenor argues that the County's definition of "Seismic Hazard Areas" is more protective than that of the IBC; and the 50' setback requirement is reasonable especially in light of the opportunity to require additional studies to locate "active fault traces." *Id.* at 7-9.

In reply, Petitioners argue that "trenching" must be done to locate "active fault traces" and that licensed geologists, not building officials, are the appropriate officials to make these determinations. Sno-King Reply, at 10-13. Petitioners also contend that the Seismic Ordinance does not reiterate, or reference, the IBC prohibition of structures being built over active faults and suggests that other "lifelines" [Petitioners do not identify these] must be protected from fault ruptures. *Id.* at 12-16. Petitioners assert that the County's action does not do enough to prevent critical facilities from being constructed on or near a fault, and that rather than filling gaps, the Seismic Ordinance "illegally diminishes the IBC requirements." *Id.* at 16- 20.

Board Discussion:

It is important to note that *only* Emergency Ordinance No. 05-122 is the subject of this challenge.

As noted *supra*, RCW 36.70A.170, .060(2) and .172 require the County to identify, designate and protect the *functions and values of designated critical areas using BAS*. At issue here is an amendment to the County's Building Code provisions addressing the construction of certain structures in geological hazard areas; not its critical area regulation update. Emergency Ordinance No. 05-122 does not identify, designate or protect the functions and values of any critical area; rather it regulates the construction of structures in geologically hazardous areas. As the Board has noted in a prior case,

The GMA has defined geologically hazardous areas as "areas that are not suited for the siting of . . . development consistent with public health and safety concerns." [RCW 36.70A.030(9)], but there is no affirmative mandate associated with this definition except to protect "functions and values [of the designated critical area]." Petitioners have not persuaded the Board that the requirement to protect the function and value of critical areas has any meaning with respect to volcanic hazard areas or that the GMA contains any independent life-safety mandate.

Likewise, Petitioners here have failed to persuade the Board that the requirement to use BAS to protect the functions and values of critical areas has any meaning with respect to known or inferred seismic faults. This is not to say that the use of BAS is not important in “identifying” and “designating” geologically hazardous areas;¹⁰ but rather its significance in “protecting” such critical areas verges on meaningless in the context of seismic areas.

The County’s duty and obligation to protect the public from potential injury or damage that may occur if development is permitted in geologically hazardous areas is not rooted in the challenged GMA critical areas provisions. Rather, providing for the life safety of occupants and the control of damage to structures and buildings is within the province of building codes. In Washington, the State Building Code [Chapter 19.27 RCW]¹¹ applies and is enforced by all jurisdictions throughout the state – including Snohomish County. The State Building Code, in turn, has adopted the IBC (2003 version), including its performance standards and construction requirements. *See* RCW 19.27.020. The IBC, as well as the County’s Building Code, include provisions and requirements for earthquake resistant design and construction. Ex. B-39.

Here there is no dispute that the SWIF extends through a portion of Snohomish County; nor is there disagreement that certain new faults – Lineaments 4 and perhaps X – have been discovered in the project area during the review process for an essential public facility – the Brightwater facility. There is also no disagreement that construction of buildings and structures near a seismic hazard area is governed by the IBC, as adopted by the State Building Code, and applicable to Snohomish County. However, the County has identified a “regulatory gap” which it characterizes as follows: The IBC’s seismic provisions only apply to faults that have been verified and mapped by the USGS. The recently discovered “lineaments” have not been mapped by the USGS. Therefore, the IBC provisions are not directly applicable. Consequently, to protect the public and property, the County has taken the action of adopting the Seismic Ordinance to fill this regulatory gap. Petitioners do not refute the existence of this “gap” or this characterization of the problem by the County.¹² Instead, Petitioners contend that the County’s action does not do enough.

¹⁰ The Board notes that the County is currently in the process of updating its critical areas regulations and the Board trusts that, upon completion of that process, the County will have included within its designations of Geologically Hazardous Areas the SWIF and other recently discovered faults or lineaments.

¹¹ The Board recognizes that it is not empowered to, nor will it, determine compliance with the requirements of this statute.

¹² In fact, Petitioners seem to acknowledge “the regulatory gap” when they suggest that the County could lobby the legislature to have the State Building Code include the SWIF in the IBC, if they wanted to, during the 2006 legislative session when the IBC is slated for review and update by the State. Sno-King Reply, at 16.

Emergency Ordinance No. 05-122 [and its successor 06-025] defines seismic hazard areas, where the provisions of the Seismic regulations apply, as areas where “known or inferred faults” are present. *See* Section 2 of Ordinance Nos. 05-122 and 06-025, at 2. The Seismic Ordinance provides for a 50’ setback from the edge of an “identified active fault trace” and it enables the building official to require additional studies to determine the specific location of an “identified active fault trace.” *Id.* at 2. The Board notes that the County *qualifies* the source of any information provided to the County regarding seismic hazards, requiring that it be “geotechnical studies and reports prepared by licensed professionals pursuant to Chapter 19.27 RCW or SCC 30.62.240; geotechnical studies and reports prepared by federal, state or local agencies; and geotechnical studies, reports and environmental impact statements prepared through the requirements of the State Environmental Policy Act (SEPA) Chapter 43.21C RCW.” *Id.* at 2.

The Board finds and concludes that the County’s adoption of the Seismic Ordinance [05-121] is a responsible and reasonable action in the face of the regulatory gap it has identified; and more importantly, the Petitioners have **not carried their burden of proof** in demonstrating that the County’s adoption of Emergency Ordinance No. 05-122 is noncompliant with any of the GMA’s critical area provisions alleged by Petitioners.

Specifically the Board finds and concludes that there is no discrepancy between the County’s definition of “seismic hazard areas” and the GMA’s definition of “geologically hazardous areas.” While the GMA definition imposes no independent duty upon the County to protect life safety, the Board notes that the County’s definition falls within the broader GMA definition and is more protective than that included in the IBC, since it includes protections for “inferred fault” areas. Second, the Ordinance does not just apply to a single project. The terms of the Ordinance are clear; it applies to Seismic Use Groups II and III, as well as structures within Seismic Design Categories E and F. These classifications and categories include the higher occupancy structures [*e.g.* schools and churches] that Petitioners sought to have included. Further, it is within the County’s discretion to determine how much protection to provide to the lives and property of its citizens. *See TAS, supra.* Third, the Board notes that the IBC prohibits construction “over” active faults. The Seismic Ordinance’s setback provision adheres to this principle by limiting construction not only “over” the active fault, but within 50’ of such an active fault trace. The County’s research into approaches other jurisdictions have taken supports the notion of such a setback. While Petitioners may want a larger setback, the Board believes the width of a setback is within the County’s discretion to decide, and not contrary to any of the literature presented. Further, the fact that the building official, on a case by case basis, after requiring and receiving pertinent geological information (by licensed professionals), may alter or adjust the setback also appears to be within the County’s discretion.

Conclusion

Petitioners have **not carried their burden of proof** in demonstrating that the County's adoption of Emergency Ordinance No. 05-122 is noncompliant with any of the GMA's critical area provisions alleged by Petitioners.

C. LEGAL ISSUE NO. 3 - CONSISTENCY

Legal Issue No. 3, as stated in the PFR and PHO, was modified by the Board's 5/25/06 Order on Motions. Legal Issue No. 3 is now stated as follows:

3. (A) *Did the County fail to comply with the update and consistency provisions of RCW 36.70A.130(1)(c), .060, .040(3) and (4), 020(10) and the Natural Environment [NE 1.B.2, 1.D, 1.D.4, 1.D.5, 3.A, 3.A.1 through A.5, 3.E.2, 3.E.3, 3.E.4, 3.I, and 8.B.7], Capital Facilities [CF 1.A.1, 2.A.1, and 12.A.2], and Utility [UT 1.B, 3, and 3.A] policies of the Comprehensive Plan when it adopted the Odor, Seismic, and EPF Ordinances? See 3/13/06 PFR Clarification, at 3; PHO, at 8-9; and OoM, Appendix A, at 18, and Appendix B, at 19.*

*[The Board characterizes **Issue Three A** as: Did the County fail to comply with the update and consistency (policies noted) provisions of RCW 36.70A.130(1)(c), .060 and .040(3) and (4), .020(10) when it adopted the Odor, Seismic and EPF Ordinances?]*

County Motion to Dismiss for Lack of Standing

In its response brief, the County indicates that it "has searched its records on file and has not unearthed any comments submitted by SKEA raising "the matter" of the "consistency" challenge in Issue Three." The County then challenges Petitioners' standing on this issue and moves to dismiss. Snohomish Response, at 42.

In the alternative, the County also argues that only three of the Comprehensive Plan Policies referenced in Legal Issue 3 were in effect when the challenged ordinances were adopted. Therefore, the County contends, if Petitioners do have standing to argue the consistency issue, their argument should be limited to the Plan Policies in effect at the time the challenged ordinances were adopted. This would exclude Plan Policies adopted on December 21, 2005. *Id.* at 42-44.

In reply, Petitioners contend that they "have standing to pursue this issue based upon their general participation and public comment on these ordinances." Sno-King Reply, at 22. Further, Petitioners acknowledge that the referenced Plan Policies were adopted at least two weeks after the challenged Ordinances, but contend that the County controlled the timing of its actions, and the Plan amendments and challenged Ordinances were going through the Council's process during the same period of time and the County should have proceeded in a manner that allowed full public participation. *Id.* 22-24. In their reply

brief Petitioners did not offer, or provide, any evidence to support their participation on the matter of consistency.

At the hearing on the merits the County cited to *Wells v. Growth Management Hearings Board*, 100 Wn. App. 657 (2001) to support its motion for dismissal of Legal Issue 3. Petitioners argued that the County's motion should have been brought during motions practice, not in their briefing; further Petitioners asserted that Petitioners cannot be expected to list all Plan Policies where alleged inconsistencies exist when their opportunity to testify is limited to three minutes.

Applicable Law

The *Wells* case cited by the County provided the impetus for an amendment to the GMA in 2003. RCW 36.70A.280(2)(b) has long defined GMA participation standing; identifying who may file a petition for review – “a person who has *participated* orally or in writing before the county or city *regarding the matter on which a review is being requested*.” (Emphasis supplied). The *Wells* amendment in 2003 added subsection (4) to RCW 36.70A.280, which provides:

To establish participation standing under subsection (2)(b) of this section, *a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the board.*

(Emphasis supplied).

Discussion

Petitioners' Legal Issue 3, as presented to the Board, involves the question of whether the Odor, Seismic and EPF Ordinances are consistent with the identified Snohomish County's Plan Policies. Petitioners have not provided any evidence to the Board that indicates that their participation before the County raised the consistency issue, or was even reasonably related to the question of consistency. If the County was unaware of this issue at the time the Ordinances were enacted, there was no way for the County to respond to and address the Petitioners' concerns. Therefore, the Board concludes that Petitioners have not shown that their participation was *reasonably related* to the issue presented to the Board.¹³ Consequently, Petitioners have not established “participation standing” to pose Legal Issue 3 to the Board. Legal Issue 3 is **dismissed with prejudice**.

Conclusion

Petitioners have not shown that their participation before the County was *reasonably related to the issue presented to the Board*. Consequently, Petitioners have not

¹³ The Board does not reach the question of whether plan policies generally or specific plan policies must be raised in public comment to preserve the consistency issue.

established “participation standing” to pose Legal Issue 3 to the Board. Legal Issue 3 is **dismissed with prejudice**.

D. INVALIDITY

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. However, in the present matter the Board has not found the County to be noncompliant with any of the alleged provisions of the GMA. Consequently, the Board need not inquire into the question of whether the County’s action substantially interferes with the goal of the GMA.

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- Petitioners have not established “participation standing” to pose Legal Issue 3 to the Board. Legal Issue 3 is **dismissed with prejudice**.
- Snohomish County provided effective notice and the opportunity for public comment when it adopted Emergency Ordinance Nos. 05-121 and 05-122 [pursuant to .390] and Emergency Ordinance No. 05-126. Therefore, the County has **complied** with the *applicable* public participation procedures and Goal 11 of the GMA in adopting the challenged Emergency Ordinances.
- Petitioners have **not carried their burden of proof** in demonstrating that the County’s adoption of Emergency Ordinance No. 05-122 is noncompliant with any of the GMA’s critical area provisions alleged by Petitioners.
- The case of Sno-King Environmental Alliance, Emma Dixon and Gerald Farris v. Snohomish County [King County – Intervenor], CPSGMHB Case No. 06-3-0005, is **dismissed** and the matter is **closed**.

So ORDERED this 24th day of July, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.¹⁴

¹⁴ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

APPENDIX A

Procedural Background

A. General

On February 6, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Sno-King Environmental Alliance, Emma Dixon and Gerald Farris (**Petitioner** or **Sno-King**). The matter is assigned Case No. 06-3-0005, and is hereafter referred to as *Sno-King v. Snohomish County*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges Snohomish County's (**Respondent** or **County**) adoption of Emergency Ordinance Nos. 05-121, 05-122, 05-126 and 05-127 pertaining to odor and seismic regulations, amending essential public facility regulations and approving a development agreement. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On February 13, 2006, the Board issued a "Notice of Hearing"; and on March 9, 2002, the Board held the prehearing conference (**PHC**).

On March 10, 2006, the Board received "Motion to Intervene by King County."¹⁵ Attached to the King Co. Motion were: 1) a "Declaration of Stan Hummel in Support of King County's Motion to Intervene;" and 2) a copy of a May 11, 2005 Letter from Jay Manning (DOE) to Aaron Reardon [Snohomish County Executive] and Gary Nelson [Chair, Snohomish County Council].

On March 13, 2006 the Board received Petitioners' "Clarification of Issues in Petition for Review." The same day, the Board issued its "Prehearing Order" (**PHO**) setting the schedule and Legal Issues, as clarified by Petitioners, for this case.

On March 15, 2006, the Board received a letter from Petitioner indicating that Corinne Hensley would be representing Sno-King Environmental Alliance. Additionally, the letter indicated that while Petitioner did not object to King County's participation in this matter, such participation should be limited and conditioned by the PHO.

On March 17, 2006, the Board received "Snohomish County's Response to King County's Motion to Intervene." Snohomish County did not object to intervention by King County.

On March 20, 2006, the Board issued an "Order on Intervention" **granting** intervenor status to King County.

¹⁵ The Board did not address the Motion to Intervene by King County in the Prehearing Order. I was addressed in a separate order, after the parties had the opportunity to respond. See WAC 242-02-534.

B. Motions to Supplement the Record and Amend the Index

At the March 9, 2006 PHC, the County submitted “Snohomish County’s Index to the Administrative Record” (**Index**). The Index included separate entries and identifying numbers for the record for each of the four challenged ordinances. The record for Ordinance No. 05-121 listed seven items, referenced as Index A1 through A7; the record for Ordinance No. 05-122 listed seven items, referenced as Index B1 through B7; the record for Ordinance No. 05-126 listed 34 items, referenced as Index C1 through C34; and the record for Ordinance No. 05-127 listed 14 items, referenced as Index D1-D14.

On March 28, 2006, the Board received a copy of a letter dated March 21, 2006, from Emma Dixon to John Moffat requesting that the County amend the Index to include certain specified items related to Ordinance Nos. 05-121, 05-122 and 05-127. Additionally, the letter asked that testimony related to Ordinance Nos. 05-029 and 05-031 (prior Odor and Seismic Emergency Ordinances) be included.

On March 27, the Board received a copy of a letter dated March 23, 2006 from John Moffat to Emma Dixon indicating that certain items would be added to the Index and others would not.

On April 12, 2006, the Board received the County’s Amended Index (**Amended Index**). The Amended Index listed 91 additional items by Index number, including some of the items requested by Emma Dixon.

On April 10, 2006, the Board received “Sno-King Environmental Alliance Motion to Supplement the Record.” Petitioner asked that the record be supplemented with 20 items - labeled as proposed exhibits Exh.. 1-19 and P1 through P18. Some of the proposed exhibits, but not all¹⁶, were attached to the motion.

On April 25, 2006, the Board received the County’s Second Amended Index (**2nd Amended Index**). The 2nd Amended Index noted two changes to the previous Index: (1) Index D10 should be dated October 16, 2005 and (2) Exhibit P11 should be added to the Index for both Ordinances 05-126 and 05-127.

On April 25, 2006, the Board received “Snohomish County’s Response to Sno-King Environmental Alliance’s Motion to Supplement the Record.”

On May 1, 2006, the Board received “Petitioners’ Reply to Snohomish County’s Response to Petitioners Motion to Supplement the Record.” Petitioners included a CD of the October 17, 2005 Snohomish County Council Public Hearing [Ex. A-2 and B-2] and attached three items to their reply – attachments A, B and C.

¹⁶ Petitioners sought to include the entire record from Emergency Ordinances 05-029 and 05-030. The record of these ordinances was not provided to the Board.

On May 5, 2006, the Board received “Snohomish County’s Motion to Strike.” The County asked the Board to strike attachments A, B and C to Petitioners’ reply.

On May 25, 2006, the Board issued its “Order on Motions.” **The Order allowed the record to be supplemented with eight exhibits and consolidated the County’s 2nd Amended Index into a single unified Index for the proceeding.** The Order summarized the items comprising the record in this case.

C. Dispositive Motions

On February 22, 2006, the Board received a letter from Snohomish County indicating that it intended to bring several dispositive motions to dismiss all or major portions of this matter. Petitioners were copied on the letter to the Board. Such motions, and the timing of their filing, were discussed at the PHC.

On March 9, 2006, at the PHC, the Board reviewed the proposed dispositive motions with the parties.

On April 10, 2006, the Board received “King County’s Joinder and Brief in Support of Snohomish County’s Dispositive Motions.”¹⁷ King County supported, and incorporated by reference, Snohomish County’s arguments for dismissal. King County also briefed the question of the Board’s subject matter jurisdiction over Ordinance No. 05-127 [the Development Agreement].

On April 11, 2006, the Board received “Snohomish County’s Dispositive Motions” with 20 exhibits from the 2nd Amended Index. The County sought dismissal of many of the Petitioners’ claims. The County asserted that the Board had no jurisdiction over development agreements and that the Petitioners, with some exceptions, lacked standing under both GMA and SEPA. The County further asserted that Legal Issues 1, 2A, 2B, 3B, and 3C should be dismissed for various reasons.

On April 25, 2006, the Board received “Sno-King Environmental Alliance’s Response to Snohomish County’s Motion to Dismiss,” with 4 attachments, each proposed as additional exhibits to supplement the record [P-19, P-20, P-21 and P-22].

On May 1, 2006, the Board received “Snohomish County’s Reply Re: Dispositive Motions,” with 4 attached exhibits from the Index.

On May 5, 2006, the Board received the County’s Motion to Strike, asserting that exhibits attached to Petitioner’s Response – Dismiss were improperly before the Board because they were not in the County’s 2nd Amended Index nor are they the subject of a Motion to Supplement the Record.

¹⁷ In granting intervener status to King County, the Board limited King County’s participation in this proceeding, including motions. King County was authorized to support motions offered by Snohomish County, not initiate any dispositive motions of its own. *See* Order on Intervention, (Mar. 20, 2006), at 2-3.

The Board did not hold a hearing on the dispositive motions.

On May 25, 2006, the Board issued its “Order on Motions.” The Order both **granted** in part, and **denied** in part, the various Snohomish County’s motions to **dismiss**.

D. Briefing and Hearing on the Merits

On June 8, 2006, the Board received “Sno-King Environmental Alliance et al.’s Prehearing Brief” with five attached exhibits (A-E). (**Sno-King PHB**).

On June 22, 2006, the Board received: 1) “Snohomish County’s Response Brief” with 14 attached exhibits (three referenced as Appendices and 11 exhibits from the Index) (**Snohomish Response**); 2) “Snohomish County’s Motion to Supplement the Record” with an attached copy of one item [King County Hearing Examiner decision dated August 3, 2004 – Denying Appeal, subject to condition of the Brightwater Final EIS appeal of adequacy.] (**Snohomish Motion – Supp.**); and 3) “Intervenor King County’s Response Brief” with one attached exhibit. (**King Response**).

On June 29, 2006, the Board received “”Petitioners Reply Brief” (**Sno-King Reply**), with three attachments.

On July 6, 2006, the Board held the Hearing on the Merits (HOM) at the Board’s offices at Suite 2470, 900 Fourth Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Margaret A. Pageler and Bruce C. Laing¹⁸ were present for the Board. Corinne Hensley appeared for Petitioners Sno-King Environmental Alliance, and Emma Dixon appeared *pro se*. Petitioner Gerald Farris did not appear. Respondent Snohomish County was represented by John R. Moffat, Lisa Anderson and Shawn Aronow. Intervener King County was represented by Verna P. Bromley. Court reporting services were provided by Eva Jankovits of Byers and Anderson. Board Law Clerk, Julie Taylor and Board Externs Brian Payne and Kris Hollingshead were also present. The hearing convened at 10:00 a.m. and adjourned at approximately 12:15 p.m.

¹⁸ Board member Bruce C. Laing’s term was slated to expire on June 30, 2006. However, Governor Gregoire extended Mr. Laing’s term until a new Board member can be seated.